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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

STATE OF NEW MEXICO, *Petitioner*,

v.

DAVID MATHEWS, Secretary of Health, Education and Welfare, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner the State of New Mexico on behalf of the Regents of the University of New Mexico respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 13, 1975.

OPINION BELOW

The decision below is reported at 517 F.2d 989 (10th Cir. 1975) and is appended hereto as Appendix A.

JURISDICTION

The decision below was entered on June 13, 1975 and a rehearing was denied on July 16, 1975. This Court has jurisdiction under 28 U.S.C. § 1254(a)(1).

QUESTION PRESENTED FOR REVIEW

Whether public employers under contracts with the Department of Health, Education and Welfare for social security coverage of their employees must make contributions in lieu of taxes with respect to "wages" as defined in 26 U.S.C. § 3121 and rulings of the Treasury Department issued thereunder, or as defined in 42 U.S.C. § 409 and rulings of the Respondent issued thereunder.

STATUTES INVOLVED

This case involves the following statutes, the material provisions of which are set out in Appendix B hereto: 26 U.S.C. § 3101, § 3111(a), § 3121(a)(2) and (b)(7)(1970 ed. Vol. 6, pp. 6880 *et seq.*); 42 U.S.C. § 409(b), § 410(a)(7), § 418(a)(1), (a)(2), (e) and (i) (1970 ed. Vol. 9, pp. 9777 *et seq.*); § 5-7-2(a), and § 5-7-3(a)(1), (2), New Mexico Statutes Annotated (1953 Comp., Repl. Vol. 2, Pt. 1, pp. 300 *et seq.*). The Internal Revenue Code provisions are shown in the form applicable for 1968; subsequent amendments are irrelevant to the issue involved.

STATEMENT OF THE CASE

The State of New Mexico and Secretary of the Department of Health, Education and Welfare made an agreement pursuant to 42 U.S.C. § 418 providing for coverage of certain employees of the State under the

Social Security Act. During the year 1968, Mr. Galloway, an employee of the University of New Mexico covered by the contract, was absent from work because of illness. Under the University sick leave plan, he received $324.97 as sick leave payments. The University did not make a Social Security contribution with respect to these payments, and the Social Security Administration, Respondent's delegate, assessed $28.60 with respect thereto. After exhausting its administrative remedies, the State sued on behalf of its subdivision, The Regents of the University of New Mexico, pursuant to 42 U.S.C. § 418(t) for a redetermination of the correctness of the assessment in the United States District Court for the District of New Mexico. The trial court granted summary judgment for the Secretary and on appeal, the Court of Appeals for the Tenth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

The Decision Below Failed to Apply the Clear Words of the Governing Statutes and in so Doing, puts in Doubt the Validity of Contracts for Social Security Coverage of Public Employees in New Mexico and Other States

This Petition presents an important question in the administration of the social security system for public employers and employees involving a conflict between administrative interpretations of the applicable statutes by the Social Security Administration on the one hand and the Internal Revenue Service on the other. The precise question is whether public employers in general, and the University of New Mexico in particular, must make Social Security contributions with respect to "wages" as defined by 26 U.S.C. § 3121 and the rulings of the Commissioner of Internal Revenue thereunder, or, as the Court below held, with respect to

"wages" as defined by 42 U.S.C. § 409 and the contrary ruling of the Social Security Administration. Although the statutory definitions are for all relevant purposes identical, the administrative rulings are in direct conflict. Both statutes provide that remuneration "on account of sickness or accident disability" is excluded from "wages." Under 26 U.S.C. § 3121, the Commissioner has issued Rev. Rul. 65-275, 1965-2 C.B. 385, excluding from "wages" all sick leave payments made pursuant to a general plan or system. There is no dispute that, if § 3121 and the Commissioner's ruling govern, the payments in question are excludable and the decision must be reversed (App. A herein p. 5a). However, under 42 U.S.C. § 409, the Administrator issued SSR 72-56 requiring for the sick pay exemption not only a general plan or system but also, among other non-statutory requirements, a showing that the plan calls for an employee to be paid "solely on account of sickness" rather than for an employee to "receive his regular salary despite sickness." Under this narrower administrative definition of the sick pay exclusion from "wages", the Administrator included the University's payments to Mr. Galloway in "wages." Therefore, the case turns on whether § 3121 or § 409 applies.

Petitioners contend that in straight-forward words the relevant statutes state that the definition in § 3121 applies. Whatever distinction the Secretary may make between payments "on account of sickness" and wages continued "despite sickness" is irrelevant to this case because the statutes give him no authority to issue rulings increasing or decreasing the contributions required of public employers, and because the definition of "wages" in § 409 does not measure the State's obligation for contributions.

Under 42 U.S.C. § 418(e)(1)(A), agreements between the State and the Secretary * must provide that the State shall "pay the Secretary of the Treasury, at such time or times as the Secretary of Health, Education and Welfare may by regulation prescribe, amounts equivalent to the sum of the taxes which would be imposed [under the Federal Insurance Contributions Act], if the services of the employees covered by the agreement constituted employment as defined in [the FICA chapter of the Internal Revenue Code]." "Employment" is so defined in § 3121(b); "wages" from employment are defined in § 3121(a); and "the sum of the taxes which would be imposed" under the Federal Insurance Contributions Act are those imposed by § 3101 and § 3111. The amount of these taxes is calculated with reference to "wages" as defined in § 3121. Because the amounts payable under § 418(e)(1)(A) agreements are determined with reference to "employment" as defined in § 3121(b), and, therefore, "wages" as defined in § 3121(a), the authority of the Respondent, or the Social Security Administrator as his delegate, to issue regulations regarding contributions payable under such agreements is limited by § 418(e)(1)(B) to "payments and reports." Any definition of "wages" in § 409(b) is not relevant to the computation of the amount due. Authority to issue regulations or rulings regarding determination of the amount of contributions required is clearly reposed in the Secretary of the Treasury or his delegate, the Commissioner of Internal Revenue. That conclusion is confirmed by 42 U.S.C. § 418(i),

* Such agreements are necessary because state employment is excluded from the general definition of "employment" under § 3121(b)(7).

which directs the Respondent to "make the requirements imposed upon the states . . . the same, so far as practicable as those imposed upon private employers."

The courts below correctly read the language of § 418(i) to imply that the "requirements" imposed upon the states need not be *identical* with those imposed upon private employers, but they lost sight of the mandate of § 418(e)(1)(A) that public employers' contributions must be *"equivalent"* to the taxes imposed upon private employers. The courts below thus incorrectly concluded that § 418(i) necessarily implied authority to issue the ruling here involved, which determines the amount of the contributions due from public employers in respect of sick pay in a manner diametrically opposed to the rulings of the Commissioner of Internal Revenue applicable to private employers. The explicit provisions of § 418(e)(1)(B) limit the Secretary's authority to issuance of regulations relating to time for payments and required reports, and under § 418(i) he must conform those limited requirements "so far as practicable" to the requirements imposed upon private employers by the Internal Revenue Service. The Secretary obviously has no statutory authority to increase the contributions of public employers above those imposed on private employers. Because defendant's ruling on sick pay by public employers materially increases such contributions above amounts "equivalent" to the amounts due from similarly situated private employers the ruling exceeded defendant's authority and is void.

The court below incorrectly viewed the issue as whether the Secretary was entitled to interpret § 409-

(b) in such a way that the payments to Mr. Galloway were not excludable from "wages." (App. A herein p. 2a.) In fact, § 409(b) is not relevant in determining the University's contributions under the agreements authorized by § 418(e)(1)(A). Section 409 defines "wages" only for the purposes of determining social security benefits. The definition of I.R.C. § 3121 governs the required level of contributions because of the specific reference in § 418(e)(1)(A). The court also misconstrued the legislative history of 42 U.S.C. § 409(i) and the definition of "employment" in 42 U.S.C. § 410(a), which, though applicable to the subchapter including § 418, does not alter the specific reference of § 418(e)(1)(A) to the definition of "employment" in I.R.C. § 3121(b). Since the contributions required of a public employer are to be "equivalent" to those imposed on private employers, the defendant's ruling on sick pay is erroneous and petitioner must be entitled to exclude its sick pay from "wages" in the same manner as private employers.

The importance of the question raised by this case must not be underestimated. If the decision below stands, there is grave doubt whether the State of New Mexico is authorized to continue to contract for Social Security coverage for its employees. It appears that all of the present contracts for coverage might be invalidated. Under § 5-7-1, *et seq.*, N.M.S.A. 1953, the State is authorized to contract for Social Security coverage, but it is authorized by § 5-7-3(a)(2) N.M.S.A. 1953 to make contributions only with respect to "wages" and to withhold under § 5-7-4 N.M.S.A. 1953 only with respect to "wages." "Wages" are defined in § 5-7-2(a) N.M.S.A. 1953 by specific reference to

the FICA provisions of the Internal Revenue Code, not to 42 U.S.C. § 409(b):

> "The term 'wages' means all remuneration for employment as defined herein, including the cash value of all remuneration paid in any medium other than cash, *except that such term shall not include that part of such remuneration which, even if it were for 'employment' within the meaning of the Federal Insurance Contributions Act would not constitute 'wages' within the meaning of that act.*" [Emphasis added.]

Therefore, the State is authorized to contribute and withhold only to the extent of "wages" as defined in 26 U.S.C. § 3121(a); it is prohibited from contributing on the broader basis of wages including sick pay which the Court below found applicable.

The same problem arises with respect to most other states, since the majority have the identical definition of the "wages" with respect to which the state is authorized to pay Social Security contributions. See e.g. Code of Alabama, Title 55, § 477; Arizona Revised Statutes, § 38-701; Arkansas Statutes (1947), 12-2402; Connecticut General Statutes, 7-452; 29 Delaware Code Ann. § 5701; Florida Statutes Ann. § 650.02; Georgia Code Ann. § 99-2102; 65 Purdon's Pennsylvania Statutes Ann. § 202, Revised Civil Statutes of Texas, Art. 695 g(1), 695 h(1). Therefore, the Court's holding that wages as defined in § 409 governs means that states must pay taxes on a basis prohibited by their enabling legislation.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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October 10, 1975